MOTION FILED
JAN 29 1987

No. 86-1079

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STEPHEN A. KOCZAK, KATHERINE E. ROTTER, and JOHN G. RESCH

Appellants,

v.

G. DALLAS DIXON, THE MERCER COUNTY DEMOCRATIC CENTRAL COMMITTEE, JEFFREY LAURENTI, HOWARD KAYE, GERALD STOCKMAN, LOUISE LOMMA, JANE BURGIO, W. CARY EDWARDS, THOMAS H. KEAN,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE NATIONAL LEGAL FOUNDATION AMICUS CURIAE, IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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THE UNITED STATES
October Term, 1986
No. 86-1079

Stephen A. Koczak,
Katherine E. Rotter, and
John G. Resch,

Appellants

v

G. Dallas Dixon, The Mercer
County Democratic Central
Committee, Jeffrey Laurenti,
Howard Kage, Gerald Stockman,
Louise Lomma, Jane Burgio,
W. Cary Edwards, Thomas H. Kean

Appellees

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF THE NATIONAL LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 42(3) of the Rules of this Court, The National Legal Foundation respectfully moves the Court for leave to file a brief amicus curiae in the above entitled case. Counsel for Appellees have not replied to movant's letter requesting consent. Appellants have granted their consent.

The National Legal Foundation is an organization devoted to advocacy and support of Constitutional Rights and

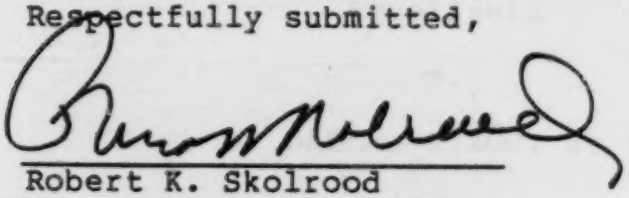
Liberties. In this capacity, The National Legal Foundation is gravely concerned about threats posed to Constitutional freedoms, including the rights of people to participate in the electoral process without discrimination and thus to preserve a republican form of Government. The Court's disposition of this case could dramatically affect those freedoms. Briefly stated, the principal issue at stake in this controversy involves the rights of a candidate for national office to appear on the primary ballot on an equal footing with other candidates. In particular, the case involves an alleged subterfuge by the defendant Mercer County Democratic Central Committee to avoid the strictures of election law and violate Plaintiffs/Appellants' Constitutional rights. This appeal, however, precisely focuses on the issue of Federal Court jurisdiction. The court below, affirmed on appeal, granted a Motion to Dismiss, based apparently on a conclusion that there was insufficient Federal subject matter jurisdiction. This is the central issue of the brief supplied herewith by The National Legal Foundation as amicus curiae. In short, the Federal District Court should be directed to recognize Federal jurisdiction in this matter for the reasons set forth in the brief.

Counsel of Record for amicus curiae Robert K. Skolrood is Executive Director for The National Legal Foundation and Paul S. McConnell is staff counsel for that organization. Counsel for amicus curiae specialize in Constitutional litigation and have participated in significant cases relating to First Amendment and other constitutional freedoms.

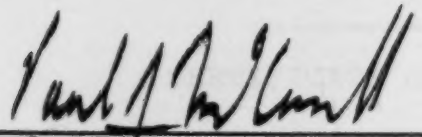
CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying amicus brief in the present case in support of the position of the Appellants.

Respectfully submitted,



Robert K. Skolrood



Paul S. McConnell

Attorneys for The National Legal Foundation

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OCTOBER TERM, 1986

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STEPHEN A. KOCZAK, et al,

Appellants

v.

G. DALLAS DIXON, et al

Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of Jan. 28, 1987, three copies of the Brief of Amicus Curiae, and a copy of the Motion for Leave to File Brief of Amicus Curiae and Statement Concerning First Class Mailing, were sent by first class mail with postage prepaid to each of the following pursuant to S. Ct. Rule 28.5(b):

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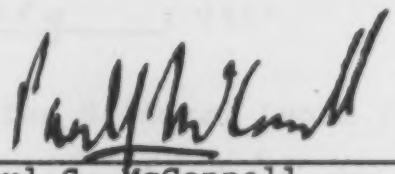
I further certify that service is not required on any other persons, and that all parties required to be served have been served as required under S. Ct. Rule 28.



Paul S. McConnell
Attorney for Amicus Curiae
The National Legal Foundation

STATEMENT CONCERNING FIRST CLASS MAILING
(Pursuant to Rules 28.2 and 28.5)

I hereby affirm that the enclosed Brief of Amicus Curiae was deposited in a United States Post Office or mailbox, with first class postage prepaid and properly addressed to the Clerk of this Court, on January 28, 1987, which was within the time allowed for filing; and that I am a member of the Bar of this Court.

Subscribed this 28th day of January, 1987.

The National Legal Foundation

By: Paul S. McConnell
Paul S. McConnell

Subscribed and Sworn before
me this 28th day of
January 1987.

Notary Public

My Commission Expires: April 23, 1989

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INTEREST OF AMICUS CURIAE

The National Legal Foundation is gravely concerned about threats posed to constitutional freedoms, including the rights of the people to participate in the electoral process without discrimination and thus to preserve a republican form of government. The Court's disposition of this case could dramatically affect those freedoms.

The National Legal Foundation is a non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights and other inalienable liberties.

Counsel of record for amicus curiae, Robert K. Skolrood is Executive Director and Paul S. McConnell is Staff Counsel for The National Legal Foundation. Counsel for amicus curiae specialize in constitutional litigation and have

participated in significant cases relating to First Amendment and other constitutional freedoms.

The National Legal Foundation believes the expertise of its attorneys will be of assistance to the Court in this case.

ISSUE PRESENTED

Whether the district court wrongly dismissed plaintiffs' complaint on the grounds of lack of federal jurisdiction where plaintiffs have alleged a violation of their rights under 42 U.S.C. 1983 the Equal Protection and Privileges and Immunities clauses of the 14th Amendment?

SUMMARY OF ARGUMENT

Federal jurisdiction in this case is manifest. The District Court was in error

in granting Defendants'/Appellees' motion to dismiss based on a failure of cognizable subject matter jurisdiction. Jurisdiction exists, however, and is based on 28 U.S.C. 1331 and 42 U.S.C. 1983. Both sections, in turn, require a violation of constitutional rights or other statutory privilege. The rights contravened by Appellees' actions and inactions as alleged in Plaintiffs'/Appellants' complaint include Appellants' Equal Protection rights and Privileges and Immunities of U.S. citizenship. Furthermore, the state statutes and standards implicated are in fact federal election law per Article I Section 4 of the U.S. Constitution. Hence, a violation of these standards is, in effect, a violation of federal law and further substantiates federal court jurisdiction.

STEPHEN A. KOCZAK, et al.

Appellants

v

G. DALLAS DIXON, et al.

Appellees

ARGUMENT

I.

STATUTORY BASIS OF FEDERAL COURT JURISDICTION

Appellants, Plaintiffs below, invoked Federal Court subject matter jurisdiction pursuant to 28 U.S.C. 1331 and 42 U.S.C. 1983, inter alia. The object of this Amicus brief is to address the District Court's surprising manifest rejection of

subject matter jurisdiction.[1] Despite the clarity of the pleadings and oral argument, Judge Cowen succinctly stated in his Opinion (see, Appellants' Appendix 1-1 et seq.) "I fail to see how he [plaintiff], as has stated, a claim under federal law upon which relief can be granted." He thereupon denied Plaintiffs' Motion for Preliminary Injunction and granted Defendants' Motion to Dismiss.

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[1] 42 U.S.C. 1983 provides, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. 1331, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Both U.S. statutes above cited grant Federal Courts subject matter jurisdiction based on constitutional claims. Section 1331 of course grants original jurisdiction to Federal Courts and Section 1983 provides the federal statutory vehicle. The 1983 action must be grounded on an alleged deprivation of "rights, privileges, or immunities secured by the Constitution and laws...." Therefore, the question common to both, and thus at the heart of the dispute, is whether any such deprivation has been adequately pleaded. If so, the District Court is bound to exercise its original jurisdiction. Bell v. Hood, 327 U.S. 678 (1946). This the court refused to do, requiring Appellants/Plaintiffs to pursue vindiction of their state statutory violations in state court, apparently the only

justiciable matter in the court's mind.[2] The District Court's failure to recognize the federal rights and privileges at stake in this case as cognizable before a Federal Court is the basis of appeal herein.

II.

APPELLANTS HAVE RAISED SUFFICIENT CONSTITUTIONAL CLAIMS TO SUPPORT FEDERAL COURT JURISDICTION

Incredibly, in a dispute involving issues central to the life and existence of constitutional, democratic government, viz access on an equal basis to elections and qualified candidates, the court below found no grounds for federal

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[2] Judge Cowen further opined: "Not only is there not a likelihood of success on the merits, but quite frankly, there is no likelihood of success, since the Court does not even have jurisdiction in the matter."

jurisdiction.[3] There is a constitutional footing to Appellants' claim, of course, rooted in their Fourteenth Amendment rights and privileges. Thus the district court should have accepted jurisdiction. England v. Louisiana Medical Examiners, 375 U.S. 411 (1964) overruled on other grounds, Allen v. McCurry, 449 U.S. 90 (1980). The gravamen of this action is not the unconstitutionality of state statutes or even a violation of state law per se. That the standard of protection

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[3] Judge Cowen apparently during the hearing had a clear grasp on the plaintiffs' jurisdictional argument which the court elucidated while attempting to enlighten defense Counsel. E.g. The Court: "Well, they say that their... equal protections are being abridged because they are not being treated equally as anyone also who is vying for a position in the primary. And that is a violation of the Fourteenth and First Amendments." See, Appellants Appendix 17-40 to 17-46. Apparently defense Counsel's "sincere beliefs" to the contrary without any authority cited, were persuasive.

is found in part in state law does not convert the federally guaranteed rights into a state issue. Rather, the object of this lawsuit is to preserve Appellants constitutional liberties from Defendants' attack, as provided by the several provisions herein referenced.

One of the reasons §1983 was enacted according to this Court in Monroe v. Pape, 365 U.S. 167, 187 (1961)[4] was the lack of state level enforcement of Fourteenth Amendment rights "by reason of prejudice, passion, neglect, intolerance, or otherwise." This failure involves both defendant state officials and the quasi-statutory Mercer County Democratic Central Committee and related individual

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[4] Monroe was overruled in part on other grounds pertaining to its narrow interpretation of "person" for purposes of Section 1983 by Monell v. New York Dept. of Social Services, 436 U.S. 658 (1978).

defendants. Plaintiffs'/Appellants' complaint sets forth these shortcomings with particularity and should be taken as true for purposes of determining federal court jurisdiction on the motion to dismiss. Los Angeles v. Preferred Communications, Inc. 476 U.S. ____, 90 L.Ed.2d 480, 487 (1986). See especially Complaint Counts V and VI set forth in Appellants' Appendix 8-32. et seq.

1. EQUAL PROTECTION

The nub of Appellants' Constitutional claim is found in the Fourteenth Amendment's Equal Protection Clause.[5] This is not a judicial appeal for political relief.

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[5] "No state shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws."

> The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." Baker v. Carr, 369 U.S. 186, 217 (1962).

In a political context, Appellants have been denied equal protection in their capacities as voters and candidates.

Appellants have not challenged the New Jersey elections laws as themselves being in contravention of constitutional precept. Those statutes are an obvious attempt by the New Jersey legislature to maintain equality among the various primary candidates. Defendants actions as alleged, were designed to precisely override the equal protection mandated by the statutory design.[6] E.g. State law

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[6] In Yick Wo v. Hopkins, 118 U.S. 356, 374, (1885) "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between

proscribes endorsement of any candidate prior to the primary. See, N.J.S.A. 19:34-52 and related statutes gathered at Appellants' Appendix 38-1 et seq.

In the past, the right to vote has been the subject of much comment. In Ex Parte Yarbrough, 110 U.S. 651, 666, 28 L.Ed. 274 (1884), this Court stated:

> "It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people."

In Smith v Allwright, 321 U.S. 649, 662, (1944) the Court recognized the right to vote in a primary was a fundamental right. If this is true in the voting process, a fortiori it should apply to the process whereby the candidates are selected. The court in Williams v.

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persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Sclafani, 444 F.Supp. 906, 911 (1978, S.D.N.Y.), aff'd without op 580 F.2d 1046 (2d Cir. 1978), recognized that:

> "T]he right to appear on the ballot is integral to the right to vote and must be measured by the same test of constitutionality. See, Williams v. Rhodes, 393 U.S. 23, (1968). Candidates have standing to assert this right."

Unquestionably, the policies, practices and omissions of defendants as alleged impinge upon this fundamental right. To the extent Appellants have been wrongly excluded from equal standing during that process, thus being denied their fundamental liberty to run for political office, or denied qualified candidates from which to choose by an in camera procedure, they have been denied the Equal Protection guaranteed them by the 14th Amendment.

The facts in the instant case bear similarily to those in Smith v. Cherry,

489 F.2d 1098 (7th Cir. 1973). In that case, the District Court granted defendant's motion to dismiss for failure to state a claim. Plaintiff therein alleged fraud in the manner in which the Democratic Committee conducted a primary for the 12th Illinois Senatorial District. According to the complaint, defendants fraudulently slated a highly electable candidate for the primary who would step down subsequent to the primary election and be replaced by the Democrats with someone who may have been less electable at the primary level, thereby subverting the electoral process. Plaintiff lost the primary. Plaintiff alleged that had the ultimate party nominee been forced to run against him in the initial primary, plaintiff may have been elected. He invoked jurisdiction under 42 U.S.C. §1983 and the 1st and 14th Amendments seeking declaratory and

injunctive relief. This district court was reversed and remanded by the Seventh Circuit which concluded that the complaint was sufficient to allege a possible Equal Protection violation. Quoting from Shakman v. Democratic Organization, 435 F.2d 267, 270 (7th Cir. 1970), the court reasoned, "The interests of candidates in official treatment free from intentional or purposeful discrimination are entitled to constitutional protection." Cherry p. 1103.

Similarly in the instant case, plaintiffs have alleged violations of their 14th Amendment rights. While the factual setting does not involve exclusion from the party ticket, it alleges the same kind of preclusive political activity which had a powerful discriminatory effect on plaintiffs both as to the right to stand in an equal position with others on a primary ballot, and as voters, to have

an unbiased presentation of the candidates on the ballot.

2. PRIVILEGES AND IMMUNITIES

The Privileges and Immunities clause is especially concerned "with the vindication of important relationships with the Federal Government [e.g.]- voting in Federal elections...." United States v. Guest, 383 U.S. 745, 772 (1966) (Harlan, J. concurring in part). The instant case concerns precisely this right and its corollary, the right to stand for federal office. The right to "share" in federal offices has been recognized as of the essence of privileges and immunites since Crandall v. Nevada, 6 Wall. 36, 18 L.Ed. 745 (1868). This has been

recognized as extending to primary elections in Smith v. Allwright, supra.[7]

Clearly there could be no more significant incident of U.S. citizenship than the rights emanating from the franchise. This, in part, was a basis for the Court's rejection of racially exclusive primaries in Allwright, Id. p. 657. To the extent Defendants' acts and omissions have hindered Appellant candidate from obtaining a fair opportunity to appear before the voters in a primary election relative to federal office, they have transgressed this central privilege of U.S. citizenship. Similarly, with regard to Appellant

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[7] Wherein it is stated, at 661-662: "It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the state, like the right to vote in a general election, is a right secured by the Constitution."

voters, their concommitant privilege of having access to unbiased candidates free from the intimidations of factious insider interests and control is at stake. As with Appellants' other Constitutional arguments, the Privileges and Immunities clause affords a sound basis for the exercise of Federal Court jurisdiction.

3. ARTICLE I SECTION 4

Appellants have argued and continue to argue that the state election laws pursuant to the delegation of authority in Article I Section 4, constitute those state laws as being federal in nature, thus giving rise to Federal Court jurisdiction. Appellants have set forth facts in their pleadings which plainly evince a denial of rights cognizable by Federal Courts. Appellees, on the other hand, are attempting to defend a system reminiscent of England's "rotten boroughs" by which private party elites control

elections apart from any popular oversight. This framework the Constitution's framers expressly rejected in Article I Section 4 which provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Article I Section 4 acknowledges that the best locus of supervision in a federal election should be at the state level. However, recognizing the potential for corruption, the framers wisely retained for the government of the Union the ultimate authority for oversight and control. Thus, for purposes of federal elections, state governments and their positive law are uniquely the agents of the national. In this sense, state election laws are federalized by constitutional design. Hence, their

violation gives rise to Federal Court jurisdiction as "arising under" the laws of the United States. 26 U.S.C. 1331. This is no abrogation of Federalism, but as Jay, Wilson and Hamilton, inter alia, recognized it was of the essence for the preservation of the nation.[8]

This Court has recognized further that to the extent the state government delegates a portion of that authority to political parties, those parties become agencies of the state, Allwright, supra

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[8] Wilson: "This, Mr. President, is not only a proper, but a necessary power, for every government should possess the means of self-preservation. 2 JENSEN, THE DOCUMENTARTY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 405-6.

Jay: "Congress should have power, by law, to support the government, and prevent the dissolution of the Union." 2 ELLIOT 326.

Hamilton: "Every government ought to contain in itself the means of its own preservation..." FEDERALIST PAPERS, No.59.

p. 663, and thus are themselves subject to federal law to the extent they violate constitutional rights. The danger of such delegation is manifest as in this case where by subterfuge the restraints of state statutory law governing elections have been evaded. The only question, therefore, is whether there has been a violation of Constitutional right or federalized state law in the de facto primary procedures.

III.

CONCLUSION

These issues are manifestly federal in their significance and import. 42 U.S.C. 1983 provides for the vindication of such civil rights before the federal courts, and 28 U.S.C. 1331 grants original federal court jurisdiction. The decisions below have

effectively barred Appellants from the exercise of their federal electoral rights and their protection in federal courts. This Court, therefore, should accept the Appeal and note jurisdiction.

Respectfully Submitted,

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